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Attorneys for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

DESIGNATION OF PORTIONS OF RECORD TO BE REPRODUCED IN THE SINGLE APPENDIX

To Erwin N. Griswold, Solicitor General and Attorney for Respondent:

Please Take Notice that Petitioner designates the following portions of the record in the above-entitled case as the portion to be reproduced in the single appendix:

1) All docket entries.

2) All pleadings in the District Court and the Judgment of the District Court.

3) Page 31, beginning at line 6, through page 34 of the Reporter's Transcript of proceedings of March 29, 1967, in the District Court.

4) The opinion of the three-judge panel of the Court of Appeals rendered on September 11, 1968.

5) Order of Court of Appeals, dated October 18, 1968, reversing judgment of the District Court.

6) Order of Court of Appeals, dated October 23, 1968, recalling mandate.

7) Order of the Court of Appeals, dated October 23, 1968, requiring the case to be heard en banc.

8) Opinion of the Court of Appeals, en banc, rendered on February 2, 1970.

9) Order of the Court of Appeals, en banc, entered February 2, 1970, affirming the judgment of the District Court.

10) As an exhibit to be included in the Single Appendix, the following pages from Petitioner's Selective Service file, which was introduced into evidence in the District Court: 7, 17, 18, 22, 24, 25, 26, 27, 28, 35, 36, 37, 39, 63.

The issue petitioner intends to present for review is that set forth in the "Question Presented", page 2 of the Petition for Writ of Certiorari.

Dated, May 13, 1970.

PAUL N. HALVONIK,
CHARLES C. MARSON,
NEIL HORTON,
STANLEY J. FRIEDMAN,
MORTIMER H. HERZSTEIN,
By PAUL N. HALVONIK,
Attorneys for Petitioner.

CRIMINAL DOCKET 41137

THE UNITED STATES

vs.

WILLIAM WARD EHLERT

Arthur Wells, Jr., Ret'd., *Attorney for Defendant*

---

50 USC App. 462—Refused to Submit to Induction
1 Count

Cash Received:

6-5-67	**Appeal**	5.00

Cash Disbursed:

Jun 6 1967	**C.D 1-96**	5.00

May 31 1967

Proceedings

1966:

Dec. 14—

Ord. Indictment filed, issue summons ret. 1/11/67 (Sweigert)

1. Filed Indictment, issued summons.

1967:

Jan. 11—

Deft. Arr't., plead NOT GUILTY. Ord. case con to 2/10/67 to be set for Jury Trial. (Sweigert)

2. Filed Appearance as Atty, for deft.

Jan. 13—

3. Filed Elec Rec of Arr't. & Plea (Env. No. 767) by Rich.

4. Filed summons on ret. ex.,

Feb. 10—

Deft. waived trial by Jury in writing. Ord. case con to 3/29/67 for Court Trial. (Sweigert)

Feb. 13—

5. Filed Waiver of Jury Trial. (Sweigert)

Mar. 29—

Ord. case assigned to Judge Zirpoli for Trial. (Carter)

Mar. 29—

Ord. Court Trial Evid. intro. Deft. adjudged GUILTY as charged. Ref. to Prob. Off. Ord. case con to 4/24/67 for Judg't. Deft. to remain on O/R. (Zirpoli)

6. Filed Deft's. Trial Brief.

Apr. 24—

Ord. case con to 4/27/67 @ 9:45 a.m. for Judg't. (Zirpoli)

Apr. 27—

Ord. case con to 5/31/67 @ 9:45 A.M. for Judg't. (Zirpoli)

May 31—

Ord. Deft. sent. to 2 yrs. impr. (Zirpoli)

June 1—

7. Entered Judg't. and commitment (filed 5/31/67 (Zirpoli)

June 5—

8. Filed Notice of Appeal.

June 6—

Made and mailed Notice and Notice of Appeal to USA.

Made and mailed Statement of Docket Entries to CCA. and Copy of Notice of Appeal.

No. 41137

United States District Court
Northern District of California

The United States of America
vs.
William Ward Ehlert

INDICTMENT

VIOLATION: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

A true bill,
/s/ Plandus Wainwright
Foreman.

Filed December 14, 1966,
James P. Welsh, Clerk.
Presented in Open Court and Ordered

Summons 1/11/67
/s/ W. T. Sweigert

Cecil F. Poole
United States Attorney
Attorney for Plaintiff

In the United States District Court
for the Northern District of California

Criminal No. 41137

United States of America,
Plaintiff,

vs.

William Ward Ehlert,
Defendant.

VIOLATION: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

INDICTMENT

The Grand Jury charges: THAT

WILLIAM WARD EHLERT,

defendant herein, on or about February 9, 1966, in the City of Oakland, County of Alameda, State and Northern District of California, did willfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Universal Military Training and Service Act, as amended, and the rules, regulations, and direction duly made pursuant thereto, in that he, having reported for induc-

tion as ordered by his local board, did then and there refuse to submit to induction into the Armed Forces of the United States.

A True Bill.

/s/ Plandus Wainwright

/s/ Cecil F. Poole
Cecil F. Poole
United States Attorney

PGS:kt

Filed December 14, 1966,
James P. Welsh, Clerk.

District Court of the United States
Northern District of California

No. 41137

The United States of America
vs.
Wm. Ward Ehlert

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, February 10, 1967.

/s/ William Ward Ehlert
Defendant

/s/ Arthur Wells, Jr.
Attorney for Defendant

/s/ Paul Sloan
Assistant United States Attorney

Approved:
/s/ W. T. Sweigert
Judge, United States District Court,
Northern District of California

Filed February 13, 1967,
James P. Welsh, Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Defendant.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

Violation: Title 50 U.S.C. Appendix, Section 462—Refused to Submit to Induction.

DEFENDANT'S TRIAL BRIEF

Statement of the Case

The material facts appear in the Selective Service file. Defendant wishes to stress the following:

1. He was sent an Order to Report for Induction on June 16, 1965, which ordered him inducted on July 14, 1965. (No. 17)

2. On July 13, 1965, defendant sent to the local board a letter indicating that he could not accept

induction and requesting conscientious objector status. Most important is the third paragraph of the letter (No. 18):

> You may consider this an inappropriate time for such a request. Unfortunately, I have been unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time.

3. Defendant was given SS form 150. (No. 22) on July 14.

4. Defendant submitted his 150 on July 26, its due date (No. 25).

5. No actions appear to have been taken on the SS 150. The file was sent to the state director.

6. The U.S. Attorney declined prosecution. (No. 35)

7. The local board reconsidered defendant's classification sometime between January 7 and January 19, 1966 (Nos. 35, 36) and declined to reopen. The reason given was that the information submitted did not indicate "a change in . . . status beyond [defendant's] control".

8. Defendant was ordered to report under the original ORI. The new reporting date was sent to him three days after reopening was denied. (No. 38)

9. Defendant reported for but refused to be inducted. (No. 43)

Argument

I

There are numerous points which defendant wishes to raise which will not be briefed. The reason therefor is that these points have been previously adjudicated and rulings adverse to defendant now appear to be law, at least in this Circuit. Defendant will raise these points in order to preserve them on appeal, but understands that this court is bound by appellate decisions.

II

However, defendant asserts that grounds exist which compel this court to find defendant not guilty.

The local board's decision not to reopen was based solely on the ground that defendant's change in status to that of a conscientious objector was not beyond his control. On the record, this decision was erroneous.

If a change in status occurs due to a change in conscience after an Order to Report for Induction, refusal to reopen is error and appeal lies therefrom. *Keene v. U.S.*, 266 F.2d 378, 384 (1959).

The Second Circuit has recently recognized that conscientious objection may not mature until after receipt of an induction notice and may in fact be precipitated by receiving such notice. *U.S. v. Gearey*, 368 F.2d 144 (1966). As aptly put by that court:

> The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previ-

> ously matured. Section 6(j) does not set any time limit by which an applicant's conscientious objections must fully crystallize in his mind, . . . The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments.

The evidence here clearly discloses that the induction order itself triggered the crystalization of defendant's beliefs. Defendant stated (No. 18) that ". . . I have been unable to make a decision of such moment until faced with the absolute necessity to do so."

This court is well aware of the complex of factors which may make up conscentious objection. It is not a simple thing, such as a missing leg which gives a 4-F classification. Rather, a man's whole life is in review. The more sincere and honest one tries to be with oneself, the more difficult the decision becomes, for conscientious objection implies a total posture towards the world. One must strive for consistency of belief and action in situations where one is in a small minority and is met with inconsistency and questions of difficult balancing every day. It should be no surprise that some cannot make the decision until external events force the decision upon them.

Further, it is most probable that one cannot ever control whether he is or is not a conscientious objector, in the same way that one cannot control a belief in God.

This defendant should have a right to an appearance and appeal through the Selective Service Sys-

tem. The reasons therefore are clearly stated by the *Gearey* court:

> The obvious purpose of the statutory scheme which provides for intervention by the Justice Department into the Selective Service appeal procedure, is to furnish a fount of information concerning an appellant's conscientious objection claim to the Appeal Board, so that a careful and enlightened decision can be reached. The Department's recommendation is based not only on the hearing which it conducts, but also on the report it receives from the FBI concerning the accuracy and sincerity of the applicant's claim. The Justice Department's role in the appeal procedure serves another purpose. It introduces into the inquiry a government agency less intimately associated with the armed forces than the Selective Service System, and not as concerned with meeting fixed quota calls. As a result, a more objective and disinterested approach to granting exemptions can be expected.

Admittedly, defendant's SS Form 150 is not a work of art. However, it does show that the defendant may have been confused about the legal meaning of "religious" as that term is understood since the *Seeger* decision. Defendant's answer to question #6 on his SS Form 150 (No. 26) indicates he believed "religious" meant a connection with orthodox religion. Perhaps defendant qualifies as a "Seeger C.O." The best way to find out is through the Selective Service System.

To sum up: no evidence whatsoever appears from which the board could conclude that defendant's

change in status to that of a conscientious objector was within his control. In fact, the evidence is all to the contrary. His change in status having been beyond his control, he is entitled to a reopening and a reconsideration with a right of appeal therefrom.

Wells & Chesney,
Attorneys for Defendant.
By Arthur Wells, Jr.

Filed March 29, 1967,
James P. Welsh, Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Defendant.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

NOTICE OF APPEAL

Notice is hereby given that William Ward Ehlert, defendant herein, appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this proceeding on May 31, 1967.

Dated: June 2, 1967.

Wells & Chesney,
By Arthur Wells, Jr.

Filed June 5, 1967,
James P. Welsh, Clerk.

In the United States District Court
For the Northern District of California

Criminal No. 41,137

United States of America, Plaintiff,
vs.
William Ward Ehlert, Defendant.

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, do hereby [sic] that the foregoing and accompanying documents listed below, are the originals (with the exception of the Indictment and Judgment and Commitment, which are certified copies) on file in the above entitled case and constitutes the record on appeal herein.

1. Indictment
2. Waiver of Jury Trial
3. Defendant's Trial Brief
4. Judgment and Commitment
5. Notice of Appeal
6. Statement of Docket Entries

7. Plaintiff's Exhibit No. 1

8. .....Volumes of Reporter's Transcript.

In Witness Whereof, I have hereunto affixed my hand and the seal of the above entitled Court this 7th. day of June, 1967.

James P. Welsh, Clerk,
By: Ramon E. Xavier, Deputy Clerk.

Wells & Chesney
2550 Telegraph Avenue
Suite 404
Berkeley, California 94704
849-4010
Attorneys for Appellant.

United States Court of Appeals
For the Ninth Circuit

No. 21,930

United States of America,
Plaintiff and Respondent,
vs.
William Ward Ehlert,
Defendant and Appellant.

POINTS ON APPEAL AND DESIGNATION OF RECORD (RULE 17(6))

To the Clerk of the above-entitled Court:

1. A concise statement of the point on which Appellant intends to rely is as follows:

Appellant stands convicted of failing to submit to induction in violation of 50 U.S.C. Appendix §462. Appellant claimed a change in status to that of conscientious objector after receiving his notice of induction. The lower court found that defendant-appellant factually had a change of status which was

beyond his control. However, that court ruled that, as a matter of law, a factual change in status to that of conscientious objector was not legally a change beyond one's control and therefore appellant was not denied due process by failure of the draft board to reopen and reconsider his claim and to afford him a right of appeal.

The lower court erred in holding, as a matter of law, that a change in status to that of conscientious objector cannot be beyond the control of the registrant.

2. Appellant designates the following as the record which is material to the consideration of the appeal:

1) All oral proceedings in this action, including all oral testimony, and all comment and argument of counsel and court;

2) All original papers transmitted by the District Court Clerk to this Court;

3) Government Exhibit No. 1, which is a certified copy of Appellant's Selective Service file.

Dated: 26 June 1967.

Wells & Chesney,
By Arthur Wells, Jr.,
Attorney for Defendant
and Appellant.

Filed June 26, 1967,
James P. Welsh, Clerk.

Reporter's Transcript of Proceedings, page 31, line 6 through page 34:

[R.T. 31] The Court: Well, are you gentlemen ready to submit it?

Mr. Wells: Yes.

Mr. Sloan: I think there is a very practical consideration in all cases as to what decision the Board makes on these last minute submissions of a claim of conscientious objection. The Court in Boyd concluded that there must be some end to the time when registrants can raise the claim of conscientious objection rather than raise and re-raise the right to review. That would result in chaos. I think this is the very purpose of the regulation.

The Court: Of course, Judge Kaufman has a different interpretation. Well, I would say this, that if this were a case in Judge Kaufman's circuit I would feel, based on the record before me, I would have to, I would have to acquit the accused. But being primarily subject to the interpretation of the Ninth Circuit, I feel that based on the Boyd case and the Parrott case, that the evidence of course is clear that **[R.T. 32]** the accused did not report into the service.

The only other action relates to the action of the Board and interpreting the action of the Board and the propriety of the action and the basis of the action, I should be guided by Ninth Circuit cases, and guided by those cases and by the record, I feel there is a basis for the action of the Board and therefore I have to find the defendant guilty.

I do so recognizing that the legal basis for the ultimate finding as relates to the action of the Board, in

view of the reasoning in the Geary case, leaves us with a question of some merit.

Now, I don't know whether there will be an appeal taken or not, or even that this is a case that ought to be appealed. You might get a more definitive statement from the Court of Appeals as to just how far they intend the Boyd case to apply.

Now, having found the defendant guilty, and instructing the Clerk to record him guilty, what do you have in mind in relation to judgment?

Mr. Wells: I would ask the matter be submitted to the probation department.

The Court: I will submit it to the probation department. How much time do you want, or do you think we should have?

[R.T. 33] Mr. Wells: They usually take three weeks.

Mr. Sloan: That would be ample, I am sure. We would have no objection to his remaining on his own recognizance.

The Court: He may continue on his own recognizance. Do you know whether the defendant intends to take an appeal?

Mr. Wells: He does intend to take an appeal. As far as that goes, I might point out that part of that question is the question of an appeal bond so that he might remain out.

The Court: Oh, I don't think we are going to have any problem on that because, very frankly, I think there is reasonable merit to this case. On that question, I don't know how the Government feels about it.

Mr. Sloan: No, I don't think we will raise any problem.

The Court: I have enough question in my own wisdom to know that this is a good case for appeal and that I could be reversed.

Mr. Wells: Yes. No, I just meant as far as him staying out pending the appeal.

The Court: That's what I say. Having all those facts in mind, I don't think you are going to have any [R.T. 34] problem on that score. At the present time he is out on his own recognizance pending the report of the probation officer. After I receive that report of the probation officer I will pronounce judgment and sentence. I am not indicating by anything I say what my attitude may be with relation to the judgment itself.

The Clerk: Let's make it April 24th, Your Honor, at 9:45 a.m.

The Court: Very well.

Kenneth J. Peck,
Official Reporter.

United States Court of Appeals
For the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

[September 11, 1968]

On Appeal from the United States District Court for the Northern District of California

Before: MERRILL and BROWNING, Circuit Judges, and KILKENNY, District Judge

MERRILL, Circuit Judge:

Appellant has been convicted of a violation of 50 U.S.C.App. §462, in refusing to submit to induction into the armed forces. He was, on June 14, 1964, ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector.

In this respect Selective Service Regulations, 32 C.F.R. §1625.2, provide in part:

"The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction * * * unless the local board first specifically finds that

> there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

The local board refused to reopen, advising appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystalization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side are *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side is *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967), and *United States v. Al Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). On the other hand in *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), we recently held that the registrant was entitled to the opportunity to file

a conscientious objection form for which application was made after notice of induction had been mailed. We expressly rejected the contention that denial of such right was harmless and nonprejudicial. In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* ..... F.2d ..... (9th Cir. 1968), followed the same course.

We here hold that the dictates of a registrant's conscience can constitute a circumstance beyond his control. Conscientious objection itself would seem to be a contradiction of control. It is difficult to see how one could in his thinking depart at will from a conviction which honestly is dictated by conscience. Conversely, a belief conveniently subject to the control of the holder would hardly seem to be conscientiously entertained. Accordingly, crystalization of a conscientious objection occurring after notice of induction can constitute a change over which the registrant had no control, justifying reopening of classification under §1625.2.

Reversed and remanded for further proceedings in the light of this opinion.

KILKENNY, Dissenting.

Impressed, as I am, with the logic of *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), and this Court's approval of *Schoebel* in *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959) and *Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966), I would affirm.

United States Court of Appeals
for the Ninth Circuit
No. 21930
DC # 41137

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

APPEAL from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

A True Copy:
Attest: October 15, 1968
Wm. B. Luck, Clerk
By /s/ William E. Wilson
William E. Wilson, Chief Deputy

Filed and entered September 11, 1968

Filed October 18, 1968,
James P. Welsh, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

ORDER RECALLING MANDATE

Before: MERRILL and BROWNING,
Circuit Judges

The certified copy of the judgment issued on September 11, 1968, is recalled.

Charles M. Merrill
James R. Browning
Circuit Judges

Filed October 23, 1968,
Wm. B. Luck, Clerk,

United States Court of Appeals
for the Ninth Circuit

No. 21,930

William Ward Ehlert,
Appellant,

vs.

United States of America,
Appellee.

ORDER

It is ordered that, upon the vote of a majority of the active judges of the court, the assignment of the above entitled cause, heretofore made to Circuit Judges Merrill and Browning and District Judge Kilkenny, be withdrawn and that the appeal be heard en banc on a day to be fixed.

The question with which the panel will be particularly concerned is whether the crystalization of a draft registrant's conscientious objection, arrived at only after notice to report for induction, can constitute a change of status over which the registrant has no control, so as to require a reopening of his classification under section 1625.2 of the Selective Service Regulations.

Filed October 23, 1968,
Wm. B. Luck, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 21,930 In Banc

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

[February 2, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: CHAMBERS, BARNES, HAMLEY, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, CARTER, HUFSTEDLER, WRIGHT, KILKENNY and TRASK, Circuit Judges.

KILKENNY, Circuit Judge:

Appellant, on June 14, 1964, was ordered to report for induction and thereafter sought to reopen his classification in order to establish his status as a conscientious objector. Subsequently, he was convicted of failing to submit to induction into the Armed Forces in violation of 50 U.S.C.App. § 462.

Selective Service Regulations, 32 C.F.R. § 1625.2, in pertinent part, provide:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

In refusing to reopen his classification, the local board advised appellant that its action was based upon its determination that "the information submitted on SSS form 150 was not a change in your status which was beyond your control."

The District Court, in denying motion for acquittal, ruled as a matter of law that changes in status involving conscientious objection were not beyond the control of the registrant. That ruling is here asserted as error.

Whether the crystallization of a conscientious objection to war can constitute a circumstance over which the registrant has no control is a question upon which the circuits have disagreed. Upon the affirmative side, among others, are *United States v. Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *United States v. Gearey,* 368 F.2d 144 (2d Cir. 1966), *cert. denied* 389 U.S. 959 (1967), *rehearing denied* 389 U.S. 1010 (1967), and *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959). Upon the negative side, among others, are *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953), with approving dicta in *Davis v. United States,* 374 F.2d 1 (5th Cir. 1967);

United States v. Jennison, 402 F.2d 51 (6th Cir. 1968), *cert. denied* 394 U.S. 912 (1969); *United States v. Helm,* 386 F.2d 434 (4th Cir. 1967), *cert. denied* 390 U.S. 958 (1968), and *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966).

This court has never definitively ruled upon the question. In two cases relied upon by the District Court, language suggests our alignment with *Schoebel. Parrott v. United States,* 370 F.2d 388 (9th Cir. 1966); *Boyd v. United States,* 269 F.2d 607 (9th Cir. 1959). In *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968), the difference between *Gearey* and the language in *Boyd* and *Parrott* was noted and the choice of rule was expressly reserved. *Briggs v. United States,* 397 F.2d 370 (9th Cir. 1968) and *Oshatz v. United States,* 404 F.2d 9 (9th Cir. 1968) also distinguish *Gearey.* At first glance, *Boswell v. United States,* 390 F.2d 181 (9th Cir. 1968), would seem to support appellant's views. While some of the language there employed points in that direction, a close analysis reveals that the precise point here presented was not there in issue. To the extent, if any, that *Boswell* may be in conflict with our views herein expressed, it is overruled.

The statutory authorization for C.F.R. § 1625.2 is found in 50 U.S.C.App. § 460, which provides, among other things, that the President may "prescribe the necessary rules and regulations to carry out the provisions of this title." All of the authorities agree that the regulation is within the perimeter of the grant of power. Moreover, it is conceded that registrants, eligi-

ble for the draft, should not be permitted, without limitation, to challenge their status. Without such a regulation, the manpower quotas of Selective Service could not be met with any degree of certainty. An orderly administration of the Selective Service System requires such a regulation. Appellant does not really challenge the reasonableness of the regulation, nor its application to one whose conscientious objection matures prior to the notice to report. He urges that his views on the subject "crystallized" after he received the notice, and that we should follow the lead of *Sandbank, Gearey, Keene* and other similar cases.

Presumptively, every human is a rational being, having a free will and in complete charge of his own thinking. Section 1625.2, with one exception, was enacted for the specific purpose of putting to an end the function of the Selective Service System once a registrant had received his notice to report. The mentioned exception being those cases where the registrant is in a position to furnish the Board with objective evidence entitling him, *prima facie,* to a change of status by reason of circumstances beyond his control. True enough, the regulation does create a brief period during which a registrant is not eligible to present a claim of conscientious objection. This result, in our opinion, does not invalidate the regulation. The logic behind requiring a person troubled with conscientious objection to state his claim before receipt of the notice to report is extremely practicable. A Board can readily ascertain the validity of an "ex-

treme hardship",[1] "sole surviving son",[2] and other such claims and can dispose of them, without difficulty, one way or the other, prior to the reporting date. The exact opposite is true of a claim of exemption based on conscientious objection. An adjudication on the sincerity of a registrant's conscientious objection requires an exploration in depth into his past and present family, religious and vocational life. After such an adjudication, if we followed *Gearey* and similar authorities, it would then be necessary to make the additional adjudication on when there was a crystallization or maturing of the registrant's views. No such procedure is contemplated by the regulation under scrutiny.

We conclude that a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the meaning of 32 C.F.R. § 1625.2. The judgment of the lower court is AFFIRMED.

CHAMBERS, CHIEF JUDGE, BARNES, CARTER, WRIGHT and TRASK, CIRCUIT JUDGES, CONCURRING.

DUNIWAY, Circuit Judge:

I concur. I do not think that the claimed "crystalization" of conscientious objection can be said to be "a change in . . . status *resulting from circumstances*

[1] 32 C.F.R. § 1622.30 (b).
[2] 32 C.F.R. § 1622.40 (a) (10).

over which the registrant has no control." (Emphasis added.) The word "circumstances" indicates to me some fact, act or event external to the mind or consciousness of the registrant, rather than the mysterious and unfathomable internal mental and spiritual processes of the registrant himself. Whether those processes are beyond the registrant's control I leave to the philosophers among us. I think that, whatever the answer to that question may be, they are not *circumstances* beyond his control.

Dictionary definitions tend to confirm this view. *Funk & Wagnall's New Standard Dictionary* defines "circumstances" as "1. Something existing or occurring incidental to *some other act or event;* a *related or concomitant act or thing.*" (Emphasis added.) *Webster's New International Dictionary,* 2d ed., defines the word as "1. One of the *conditions under which an act or event takes place* or with respect to which a fact is determined; a *condition, fact or event accompanying, or determining* the occurrence of *another fact or event.*" (Emphasis added.)

The practical considerations mentioned by my brother Kilkenny strongly reenforce these views. The regulation should be construed in a manner consistent with those considerations.

Judge Barnes, Ely and Carter concur in the foregoing concurring opinion.

ELY, Circuit Judge (Concurring):

I concur in the majority opinion, and I also endorse the logical analysis expressed by my Brother Duni-

way. At the same time, I believe that additional factors should be recorded.

We took this case *en banc* for the purpose of considering and resolving the one important problem which the principal opinion attacks, and I am glad that our court has now supplied desired guidance on that issue. My examination of the record convinces me, however, that insofar as this particular appeal is concerned, we may have indulged ourselves in a great deal of unnecessary intellectual exercise. The contents of Ehlert's Selective Service file lead me to believe that there was no alternative to the affirmance of Ehlert's conviction even had the majority adopted the position taken by my Brother Merrill.

The sole question before the District Court was whether Ehlert's local board erred in refusing to reopen Ehlert's classification. Under the applicable Regulation (32 C.F.R. §1625.2), all recognize that the board was disempowered to reopen the classification without expressly finding that there was a change in Ehlert's status resulting from circumstances over which he had no control. In determining whether or not it could make that finding, the board could, of course, look only to that which Ehlert himself submitted in support of his belated claim for conscientious objector status.[1] Even in cases not involving an alleged change in status after receipt of the induction

[1]This was conceded in the District Court. The trial judge recognized that there was no triable issue of fact and that his scope of review was confined to the determination of whether the contents of Ehler's Selective Service file disclosed the absence of any basis in fact for the board's refusal to reopen the classification. In this connection, Judge Zirpoli commented that "the very maximum you can go by is whatever was before the Board."

notice, the registrant must "clearly establish" his right to an exemption or deferred status. *Petrie v. United States,* 407 F.2d 269 (9th Cir. 1969); *Badger v. United States,* 322 F.2d 902, 906 (9th Cir. 1963).

Ehlert set forth his representations, after he received his notice to report for induction, in the standard Selective Service Form SSS 150. As I interpret those representations, none of them supplied the barest basis, even vestigial, upon which the local board could have supported a finding either that Ehlert claimed to be opposed conscientiously to war in any form or that his alleged beliefs crystalized after his receipt of his notice to report for induction. The board would be required to make the determination whether Ehlert's representations would support the required finding, and we must presume the regularity of the board's proceedings. *Oestereich v. Selective Service Local Bd. No. 11,* 393 U.S. 233, 241, 21 L. Ed. 2d 402, 89 Sup. Ct. 414 (1968) (Harlan, J., concurring); *Bishop v. United States,* 412 F.2d 1064, 1067 (9th Cir. 1969).

The threshold question of whether Ehlert claimed to be opposed conscientiously to war in any form focuses our attention on his statements that "I believe that service in the armed forces of *this country at this time* is work toward the end of the destruction of the human race," and "the sole purpose of military service in *this country today* is preparation for a nuclear orgasm which would be totally destructive of human life and values." (Emphasis supplied.) He also stated that he did not believe in a Supreme Being, and that

he had no "religious" convictions. Furthermore, he did not claim to be driven by any moral or philosophical code that could be equated with "religion" within the meaning of *United States v. Seeger*, 380 U.S. 163, 13 L. Ed. 2d 833, 85 Sup. Ct. 850 (1965).

In addition to his failure to state a prima facie claim of conscientious objection, Ehlert also failed to present any facts that would have justified a finding that he had undergone a "change in status," i.e., he did not present a claim that his beliefs had crystalized after receipt of his induction notice. In answer to the inquiry as to "when . . . you received the training and acquired the belief which is the basis of your claim . . . ," Ehlert replied, "The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surrounding and the natural workings of an eager-to-know and questioning mind." In a letter to his local board Ehlert stated that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so. Since the receipt of my induction notice, I have begun to be more fully aware of the implications of military service at this time." This latter statement constitutes the only semblance of a claim that a new belief was reached after the induction notice, and it formed the basis for the argument at trial. District Judge Zirpoli expressed, as one of his then thoughts, the opinion that this language should be interpreted to mean that Ehlert had long been aware of his beliefs but had simply been unable to decide whether to

claim the status to which he felt entitled. At least, the board was warranted in interpreting the letter in this fashion and there was abundant basis in fact to support that interpretation. Judge Zirpoli observed that a basis in fact for this interpretation existed by reason of the long period of the development of Ehlert's attitude coupled with the late filing of the claim. Surely, too, the board was entitled to infer that Ehlert himself believed that he had undergone no change in status. When Ehlert presented his new claim, he wrote, "I realize that I no longer have the legal right to apply for the status of conscientious objector . . . ."

In his footnote 1, my Brother Merrill remarks, "The points raised in Judge Ely's concurring opinion were not reached by the District Court. . . . Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position." I cannot accept this conclusion. The judgment of conviction itself does not, of course, contain specific reasoning or include any explanation by the District Court for the ultimate determination of guilt. During the oral argument of counsel, there were numerous Socratic exchanges in which the learned trial judge clearly indicated his consideration of separate legal approaches. It is true that in the final exchange, the court made a comment which supports a portion of the minority's footnote 1. During the argument, however, the Gov-

ernment's attorney strenuously contended, and I believe correctly, that there was no factual basis upon which the board could have found a change in status. On this, in the extended colloquy, the District Judge commented, "They [the board] were not obligated to reopen." In think it is obvious, therefore, that the District Court did in fact consider, as it was obligated to consider, the problem to which my comments are directed. It is not unusual for a court, during an analytical exchange, to express thoughts that it may not, in the end, retain; consequently, I believe that we should not cull a judge's off-hand oral comments from the record and employ only some of them in order to conclude definitively that the trial court's ultimate conclusion was based solely upon only a portion of his comments.

The minority also, in its footnote 1, notes "From the record it would appear doubtful that they [the points I discuss] were reached even by the local board." This conclusion flies in the face of the presumption of regularity noted earlier, since the board would be required to make these determinations before it could inform the registrant that it would not reopen or, most certainly, before it could make the required finding that there had been presented a prima facie claim of a change of status resulting from circumstances beyond the registrant's control. Here, the only significant notation made by the board and appearing in the Selective Service file is "Reviewed and not reopened." From this, I cannot agree that there is any doubt whatsoever that the board, per-

forming its duty with regularity, could have blinded itself to the recorded facts which I have specified.

All the above notwithstanding, it seems clear to me that even if we construe the District Court's statements at the conclusion of the argument as a ruling that as a matter of law there could be no change to conscientious objector status after receipt of the induction notice, still we should hold that the District Court was not in a position to reach this question since Ehlert presented no factual basis upon which his board could have justifiably based a finding that he had presented a prima facie claim for a change of status resulting from circumstances beyond his control.[2] From Ehlert's own revelations, the board was thoroughly justified in concluding that his representations as to his beliefs, even if true, would not legally entitle him to conscientious objector status and that such beliefs were not first reached after the notice to report for induction was sent and received. Even, therefore, if we assume, arguendo, that the opposing views[3] of the dissenters are correct, I submit that we

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[2]The *Gearey* court itself recognized that late filing could be a factor in determining the sincerity of the claim or the time of crystalization. *United States v. Gearey*, 368 F.2d 144, 150 (2d Cir. 1966).

[3]The dissenters see a "hiatus" created by the fact that a literal construction of Department of Defense Directive No. 1300.6 could support the conclusion that the military will not consider claims arising before actual induction. I believe that the supposed "hiatus" is more fancied than real. I do not read the directive in this way, since the thrust of the directive is toward claims arising before the induction notice. Moreover, I am confident that military authorities would recognize a probable constitutional obligation to consider the genuineness of an inductee's claim that conscientious objector beliefs had become fixed within the brief period between the time of the notice to report for induction and his actual induction into the armed forces.

would neverthless be compelled to affirm the judgment of conviction.

CHAMBERS, Circuit Judge, concurring:

In my view, the case should be disposed of as Judge Ely would. However, a clear majority of the judges, including the dissenters, thinks the case should be resolved "on the Road to Damascus." On that road, I agree with Judge Kilkenny. Therefore, I concur in Judge Kilkenny's opinion.

MERRILL, Circuit Judge, with whom Circuit Judges HAMLEY, KOELSCH, BROWNING and HUFSTEDLER join, Dissenting:

The majority opinion, affirming the District Court, holds as matter of law that crystallization of a registrant's conscientious objection to war is not, under 32 C.F.R. § 1625.2, "a change in [his] status resulting from circumstances over which [he] had no control."[1] In this posture of the case we must assume that appellant in fact enjoys the status of a conscientious objector but is precluded from recognition of that status by virtue of the provisions of the regulation. Two distinct contentions were advanced by appellee in support of the District Court. The majority opinion appears to rely on both.

[1]The points raised in Judge Ely's concurring opinion were not reached by the District Court. From the record it would appear doubtful that they were reached even by the local board. Before the District Court the appellant asserted that the local board's decision not to reopen was based solely on the ground that his change in status was not beyond his control. The District Court dealt with the case in a manner consistent with this position.

1. First it was contended that crystallization of conscientious objection is not a "circumstance" under the regulation; that by "circumstances" the regulation was intended to include only such objectively ascertainable conditions as a change in dependency status or physical condition; that it was not meant to include such intangible considerations as state of mind. For two reasons I find this contention unacceptable: (a) I do not believe the regulation is rationally subject to such a construction; (b) so construed, I would hold the regulation to be contrary to statute and invalid.

(a) A "change in the registrant's status" under the regulation can have reference only to a change in the registrant's right to a particular classification. "Circumstances" in this context can have reference only to the conditions relevant to such a change of status. In the case of the conscientious objector status the only relevant condition or circumstance is the registrant's state of mind. The effect of the majority's construction is to single out conscientious objector as one status entitled to no consideration at this stage of the proceedings. I cannot attribute to the regulation such a discriminatory result.

Further this construction would seem to create an anomalous situation noted in *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966); *cert. denied*, 389 U.S. 959 (1967).[2]

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[2]Footnote 11, 368 F.2d at page 150, states:

"Any other conclusion would result in the anomalous situation that individuals whose claim of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for defer-

The Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *See Seeger v. United States,* 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty. The armed forces quite appropriately focus their attention on conscientious objection crystallizing after induction, leaving cases of earlier crystallization to the jurisdiction of the Selective Service System.

The majority's construction thus creates a hiatus: Those who become conscientious objectors after notice of induction but before actually being inducted would appear to be excluded from application of the Congressional policy. Application of the policy is made to depend not on one's true status but on when one acquired it.

(b) Legislation creating this exemption from military service, 50 U.S.C.App. §456(j) provides for no such limitation. The enforcement of orderly pro-

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ment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by Selective Service prior to induction cannot be entertained."

cedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service.

2. It was next contended that this "circumstance" (crystallization of conscientious belief), accepting it as such, cannot be said to be one over which the registrant has no control. In other words, assuming appellant to be a true conscientious objector, it was within his control not to become one.

This strikes me as a disparagement of the concept of conscience most out of tune with the prevailing mores of the day. One simply cannot order his conscience to be still or make himself believe what he does not believe and I must reject the implication that it is right and proper that one should suffer loss of status for having failed to bring his conscience to heel.

Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained.

The issue for the board after notice of induction, is, then, no different from that presented by an earlier claim: Is the avowed belief conscientiously entertained?[3] Only the procedure of its resolution differs. But this factual issue should be faced and not be disposed of as a matter of law on such an assumption as is here advanced.

I would reverse.

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[3]The further issue is presented: Did the belief in fact crystallize after receiving notice of induction and thus constitute a *change* in status? *Dugdale v. United States*, 389 F.2d 482 (9th Cir. 1968).

United States Court of Appeals
for the Ninth Circuit

No. 21930

William Ward Ehlert,
Appellant,
vs.
United States of America,
Appellee.

APPEAL from the United States District Court for the Northern District of California

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered February 2, 1970

[Selective Service File, p. 87]

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January 28, 1966

William Ward Ehlert
2717-A Hillegass Avenue
Berkeley, California

Dear Sir:

On March 3, 1964, you were classified I-A by this local board. SSS Form 110 (Notice of Classification) was mailed to you on March 4, 1964. You had 10 days after the mailing of this notice to file a written request for a personal appearance before this local board. You failed to do this, therefore you waived your rights of personal appearance after said classification. You also failed to appeal this classification.

Under date of June 16, 1965, you were mailed an Order to Report for Induction scheduled for July 14, 1965. You failed to comply with this order and requested an SSS Form No. 150 (Special Form for Conscientious Objectors) which was furnished.

Be informed that the local board reconsidered your classification after the filing of SSS 150 under the provisions of Part 1625 of the Selective Service Regulations and determined that the information submitted on SSS Form 150 was not a change in your status which was beyond your control. For this reason the local board declined to reopen your classification.

A personal appearance is a procedural right under the regulations only when a change in classification is made by the local board and a timely request is made by the registrant within 10 days after the classification card is mailed.

BY DIRECTION OF THE LOCAL BOARD

(Mrs.) Norma M. Niclass, Clerk

SELECTIVE SERVICE SYSTEM

BOARD NO. 18
Santa Rosa, Calif. 95404

March 2, 1966

7-3

Mr. William W. Ehlert
2901 Telegraph Avenue
Berkeley, California 94705

Subject: EHLERT, William Ward
SS No. 4 18 43 548

Dear Sir:

Following receipt of your letter your selective service file was requested for purposes of review.

We note that at the time the classification questionnaire was completed no entry was made regarding a claim of conscientious objection but that on the day you were ordered to report for induction you requested the conscientious objector form. The special form for conscientious objectors was completed and returned by you on July 26, 1965. At its meeting the local board reviewed the claim of conscientious objection and it was it's decision that the file not be reopened.

It is noted that you had requested a personal appearance which was denied by the local board. The reason for this denial was set forth in a letter to you dated January 28, 1966. It is noted that the classification of Class I-A given you on March 4, 1964 was not appealed and the first indication of your claim of conscientious objection was submitted on the day when you were to have reported for induction. The local board reviewed the matter and informed you by letter of it's decision.

On the basis of the foregoing, it appears that your procedural rights have been observed in all respects, and this headquarters contemplates no intervention.

FOR THE STATE DIRECTOR

HENRY A. CARLSON
Major, USAF
Manpower Officer

cc: LB No. 18

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United States Court of Appeals
for the Ninth Circuit

No. 21930

William Ward Ehlert,
Appellant,

vs.

United States of America,
Appellee.

CERTIFICATE OF CLERK, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 21 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, William B. Luck, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify this transcript of record in three volumes to be a full, true and correct copy of the entire record, excluding original exhibits, of the above entitled cause in the said Court of Appeals, made pursuant to the request of counsel for the appellant and certified under Rule 21 of the Revised Rules of the Supreme Court of the United States.

Attest my hand and seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of February, 1970.

William B. Luck, Clerk

Supreme Court of the United States

No. 1383 --- , *October Term, 19* 69

William Ward Ehlert,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed May 4 ---------- , 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- . Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.